BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK S. SMITH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,019,598
POWER PLAY PARTNERS, INC.,	)	
f/k/a POWER PLAY PARTNERS, LLC	)	
Respondent (Uninsured)	)	

ORDER

Respondent appeals from a January 26, 2005, Preliminary Decision entered by Administrative Law Judge (ALJ) Robert H. Foerschler.

ISSUES

The ALJ awarded claimant preliminary benefits in the form of medical treatment after determining that the Kansas Workers Compensation Act (Act) applied to this claim and, accordingly, the Kansas Division of Workers Compensation had jurisdiction to award benefits. Respondent contends that the Act does not apply because it did not meet the threshold payroll requirements of K.S.A. 44-505(a)(3).

Claimant was injured on August 24, 2004, while working for respondent. There is no dispute that claimant's injury arose out of and in the course of his employment. There is likewise no dispute that in 2003, respondent, as a limited liability company (LLC),[1] did not have a total gross annual payroll of $20,000. What is disputed is whether, immediately before claimant's accident, respondent could have reasonably estimated that it would not have a total gross annual payroll for 2004 of more than $20,000.

The ALJ found that:

> If claimant, as a more or less permanent employee, was earning $500.00 a week at that time, his wages alone would exceed $20,000 in a year, not counting other incidental laborers, who were paid $8.00 an hour and a newly employed

[1] Mr. Tilipana testified that Power Play Partners, LLC., was incorporated on July 29, 2004, and became Power Play Partners, Inc. (P.H. Trans. at 31.)

> manager allegedly at a monthly rate of $5,000.00, even if Mr. Tulipana's withdrawal [sic] are ignored.[2]

Respondent, in its brief, alleges the following:

> Respondent believes the ALJ erred in reaching this conclusion. First, for wages paid to the claimant to satisfy the $20,000 threshold he would have had to work more than 40 weeks in 2004. However, the evidence established he only worked sporadically before his injury and even if it is assumed he would have worked "full time" from the time of his injury until the end of the year such would only account for 18.57 weeks. At $500.00 per week this would result in total wages of $9,285.00. On the other hand, the "day laborers" were only hired on occasion for demolition and some of the initial construction. There is no evidence regarding the total number of hours worked or the total wages paid to these employees. Respondent's only other employee in 2004 was a "restaurant consultant" who was paid approximately $4,500.00. Accordingly, there is simply no evidence to support the ALJ's finding of a $20,000 payroll.[3]

Respondent further argues that the salary of Charles Tulipana, respondent's treasurer and part-owner, should not be included in determining the amount of respondent's annual payroll because he is one of respondent's "owners."[4]

Conversely, claimant argues that respondent could clearly have anticipated a total payroll in excess of $20,000 for the 2004 calendar year. Claimant was one of several laborers hired by respondent to do demolition and construction work on the building that was scheduled to open December 1, 2004, as a family fun center. Mr. Tulipana testified that when the family fun center was open for business, he expected there would be 20 to 25 full-time employees and approximately 60 part-time employees working at the facility. He expected that the kitchen manager would be paid $30,000 to $40,000 per year, the go-cart manager would be paid $20,000 per year and the party room manager would be paid $20,000 per year. Furthermore, Mr. Tulipana was working as an employee of respondent beginning August 1, 2004, at a monthly salary of $2,500, which was later increased to $5,000. Also, another principal of the respondent corporation, Mick Witherow, became an employee of respondent in approximately December of 2004, at a monthly salary of $5,000. In November 2004, respondent hired John Eisley as a restaurant consultant, and he was paid $3,000 per month for one and a half months, for a total of $4,500 during 2004. Accordingly, claimant argues that in addition to his anticipated payroll

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[2] ALJ's Preliminary Decision (filed Jan. 26, 2005) at 1.

[3] Brief of Respondent (filed Feb. 21, 2005) at 2-3.

[4] Brief of Respondent (filed Feb. 21, 2005) at 3.

as well as that of the other part-time employees working for respondent at the time of claimant's accident, there was a reasonable expectation that, with the additional workers expected to be hired later that year, respondent's payroll would easily exceed the $20,000 threshold.

The sole issue for the Board's review on appeal of the ALJ's preliminary hearing order is whether, immediately prior to claimant's accident, respondent should have reasonably expected its gross annual payroll for 2004 would exceed $20,000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the record compiled to date, the Board finds that the ALJ's Preliminary Decision should be affirmed.

K.S.A. 44-505(a) provides:

> Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
> . . .
> (3) any employment . . . wherein the employer has not had a payroll for a calendar year and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as a part of the total gross annual payroll of such employer for the purposes of this subsection; . . . .

Respondent contends that if wages paid to an employer's family member are not included in the total gross annual payroll, then, by implication, wages paid to the employer are not included. The Board agrees that an "employer" as defined by K.S.A. 2004 Supp. 44-508(a) is not intended to be included within the employer's payroll for purposes of K.S.A. 44-505(a)(3) unless such employer is also a "workman" or "employee" or "worker" as defined by K.S.A. 2004 Supp. 44-508(b).

> "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include but not be limited to: Executive officers of corporations; . . . . Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a, and amendments thereto, such terms shall not include

> individual employers, limited liability company members, partners or self-employed persons.[5]

K.S.A. 2004 Supp. 44-542a provides:

> Each individual employer, partner, limited liability company member or self-employed person may elect to bring such employers within the provisions of the workers compensation act, by securing and keeping insured such liability in accordance with clause (1) of subsection (b) of K.S.A. 44-532, and amendments thereto. Such insurance coverage shall clearly indicate the intention of the parties to provide coverage for such employer, partner, limited liability company member or self-employed person.

However, K.S.A. 44-543(b) places the burden on the stockholder/employee to elect out of coverage by the Workers Compensation Act.

> Any employee of a corporate employer who owns 10% or more of the outstanding stock of such employer, may file with the director, prior to injury, a written declaration that the employee elects not to accept the provisions of the workers compensation act, and at the same time, the employee shall file a duplicate of such election with the employer. Such election shall be valid only during the employee's term of employment with such employer. Any employee so electing and thereafter desiring to change the employee's election may do so by filing a written declaration to that effect with the director and a duplicate of such election with the employer. Any contract in which an employer requires of an employee as a condition of employment that the employee elect not to come within the provisions of the workers compensation act, shall be void. Any written declarations filed pursuant to this section shall be in such form as may be required by regulation of the director.

As respondent had no workers compensation insurance coverage until November 2004, payments made to members of the LLC before that date would not be included in respondent's gross annual payroll. Furthermore, such payments made after the date workers compensation insurance coverage was obtained by respondent would only be included if an election was made to provide coverage for the limited liability company members. Unfortunately, the record does not establish what, if any, elections were made. However, if respondent changed from an LLC to a corporation, then the rules governing both election of workers compensation insurance coverage and the treatment of salaries for officers and stockholders (members) would likewise change. Accordingly, the salaries paid to limited liability company members, including Mr. Tulipana and Mr. Witherow, would

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[5] K.S.A. 2004 Supp. 44-508(b).

not be included in the 2004 payroll, whereas salaries paid to corporate stockholders, officers and employees would be included.

Nevertheless, respondent could have and should have reasonably estimated, when it finalized the lease agreement for the facility on approximately August 15, 2004, which was before claimant's injury, and announced an expected opening date in December of 2004, that it would have a total payroll for the 2004 calendar year in excess of $20,000 based upon the payments it had made and would be making to claimant and the other workers on the remodeling of the facility and the salaries of the expected employees that would be hired to operate the facility. Accordingly, the Board finds that the Kansas Workers Compensation Act applied to respondent and covered claimant's August 24, 2004 accidental injury.

WHEREFORE, the Board affirms the January 26, 2005, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

IT IS SO ORDERED.

Dated this ____ day of June 2005.

BOARD MEMBER

c: Mark S. Smith, 8210 Walnut, Kansas City, MO 64114
Mark R. Schmid, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director